

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

LARRY L. PRESTON v. STATE OF TENNESSEE

**Appeal from the Criminal Court for Hamilton County
No. 265801 Barry A. Steelman, Judge**

No. E2007-02458-CCA-R3-PC - Filed June 18, 2008

The petitioner, Larry L. Preston, has appealed the Hamilton County Criminal Court's dismissal of his petitioner for a writ of error *coram nobis*, and the State has moved pursuant to Tennessee Court of Criminal Appeals Rule 20 to have this court summarily affirm the criminal court's order. Because we agree that a Rule 20 disposition is proper, we affirm the order of the criminal court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed
Pursuant to Rule 20, Rules of the Court of Criminal Appeals**

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which NORMA MCGEE OGLE and D. KELLY THOMAS, JR., JJ., joined.

Larry L. Preston, appellant, *pro se*.

Robert E. Cooper, Attorney General & Reporter; and J. Ross Dyer, Assistant Attorney General, for the appellee, State of Tennessee.

MEMORANDUM OPINION

The petitioner attacks via his 2007 petition for writ of error *coram nobis* his 1975 burglary convictions on the grounds that the underlying guilty pleas were infirm because the conviction court failed to follow the plea regimen mandated by *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709 (1969). The State bases its Rule 20 motion upon the bar of the statute of limitations and also upon the provision of Tennessee's *coram nobis* statute which limits the relief "to matters that were not or could not have been litigated on the trial of the case, on a motion for a new trial, on appeal in the nature of a writ of error, on writ of error, or in a habeas corpus proceeding." See T.C.A. 40-26-105(b). The State invokes this latter provision because the petitioner failed to raise the *Boykin* issue in two previous post-conviction proceedings.

A writ of error *coram nobis* is an extraordinary remedy by which a trial court may provide relief from a judgment under narrow and limited circumstances. *State v. Mixon*, 983 S.W.2d 661, 668 (Tenn. 1999). The grounds for *coram nobis* relief are narrow:

The relief obtainable by this proceeding shall be confined to errors dehors the record and to matters that were not or could not have been litigated on the trial of the case, on a motion for a new trial, on appeal in the nature of a writ of error, on writ of error, or in a habeas corpus proceeding. Upon a showing by the defendant that the defendant was without fault in failing to present certain evidence at the proper time, a writ of error coram nobis will lie for subsequently or newly discovered evidence relating to matters which were litigated at the trial if the judge determines that such evidence may have resulted in a different judgment, had it been presented at the trial.

T.C.A. § 40-26-105(b) (2006). The decision to grant or deny the petition for such relief lies within the sound discretion of the trial court. *See id.*; *State v. Hart*, 911 S.W.2d 371, 375 (Tenn. Crim. App. 1995).

We decline to summarily affirm the criminal court's order based upon the grounds advanced by the State. First, we address the limitations bar. In his petition, the petitioner addressed the limitations bar by claiming that the statute of limitations was tolled by principles of due process. We note that the criminal court did not rely upon the limitations bar in dismissing the petition, and now the State raises the issue, for the first time, on appeal. Thus, in this procedural context, we decline to summarily affirm the order of dismissal by imposing the limitations bar. Second, we address the State's claim that the waiver provision of Tennessee Code Annotated section 40-26-205(b) bars the current claim. Here, we note that that section's waiver provision is operative when the issue could have been litigated "on the trial of the case, on a motion for a new trial, on appeal in the nature of a writ of error, on writ of error, or in a habeas corpus proceeding." We will not analyze whether the petitioner's filing of two prior post-conviction relief petitions in which the *Boykin* issue was not raised meets section 40-26-105(b)'s terms of waiver. Suffice it to say that we decline to *summarily* affirm the order of dismissal on this basis.

That said, however, we point out that this court's use of Rule 20 to summarily affirm a lower court's action is not limited to cases in which the State moves for such relief. In the present case, we determine *sua sponte* that a proper basis for applying Rule 20 exists. In its order of dismissal, the criminal court relied in part upon the concept of waiver, but it also determined that the petition did "not state a claim for the writ" and that the "errors of which the petitioner complains are not outside the record." We agree. Simply put, the *Boykin* issue upon which the petition is based is not appropriate for *coram nobis* relief.

Because an opinion would have no precedential value and because no error of law requiring a reversal of the action is apparent on the record, we affirm the criminal court's order pursuant to Rule 20. *See* Tenn. Ct. Crim. App. R. 20.

JAMES CURWOOD WITT, JR., JUDGE